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The purpose of this text is to introduce legal sociology in Switzerland. As a first step, the location of legal sociology as a discipline within legal science is discussed and the methodology of this sub-discipline of the law is explained. Thereafter, a case study is employed to exemplify how legal sociology can be used to analyse the interrelationship between society, technology, and the law in the context of both the proper functioning of the specific form of direct democracy that exists in Switzerland and the constitutional safeguards that are in place to secure its prerequisites. Techno-economic developments have fundamentally changed the media sector. In Switzerland, this has raised the question of whether the personalisation of news reporting conflicts with the constitutional duties of the Swiss Radio and Television Corporation (SRG), the main public service broadcaster. This question arises specifically out of the formation of Admeira, a joint venture between SRG, Ringier (a media company) and Swisscom (the incumbent Swiss telecom company). Admeira allows SRG to benefit from Swisscom's large customer data volumes and broad experience in the use of targeting technologies, but raises some concern regarding their constitutional function in Switzerland.

I. What is Legal Sociology?

1. Discipline

Legal sociology, together with legal history and legal philosophy, constitutes one of the foundations of the law as a discipline of scientific study. A common feature and particularity of these sub-disciplines of the law is their close relationship with a neighbouring discipline *outside* the legal realm. In the case of legal sociology, this is obviously the relationship with the discipline of sociology. According to Emile Durkheim, one of the discipline's founders, sociology is a science that studies social phenomena as *social facts*, that is manners of acting, thinking, and feeling in society that can be observed from an objective perspective.[1] Durkheim understands sociology as a *positivistic science.* In this context, positivism entails two things: firstly, a particular view of social phenomena as objective data and secondly, a value-neutral way of examining these phenomena.[2] Consequently, the key purpose of sociology is to observe social facts as objective data in a value-neutral way. This methodology contrasts with that of the law, which is a normative discipline, operating in accordance with a societal perception of how things should be. Both the law generally and legal doctrine in particular are preoccupied with the *form* of the law, that is to say, they are fundamentally concerned with the systematic relationship between various abstract principles, which can then be used in order to logically produce decisions in concrete cases. The particularity of legal language is its performative quality.[3] For example, words in a statute or a contract do not merely describe a situation or narrate a story; they are supposed to have practical effects in the lives of individuals and within society.

1 Emile Durkheim, The Rules of Sociological Method, translated by W. D. Halls, edited and with a new introduction by Steven Lukes, New York 2013, p. 20.

2 Roger Cotterrell, The Sociology of Law: An Introduction, 2nd edition, Oxford 1992, p. 11.

3 John L. Austin, How to Do Things with Words, 2nd edition, Oxford 1975 (1962).

Legal sociology does not belong to the formally closed realm of legal doctrine nor does it merely describe legal facts in an objective way. Its paradoxical location in-between the disciplines of law and sociology is reflected in the various different names that are used to describe the field at issue; besides legal sociology, the terms sociology of law, sociological jurisprudence, jurisprudential sociology, law and society, sociolegal studies, and legal realism are also frequently encountered within the academic literature. While most of these terms lack precise contours, in this chapter, the term "legal sociology" is used in order to emphasise that the subject we are dealing with is a sub-field of the law as opposed to a sub-field of sociology. Legal sociologists can be defined as jurists who are particularly interested in studying the law from an interdisciplinary perspective. Rather than viewing the law as a formally closed and scientifically self-sufficient system, they observe the law as a realm embedded within broader societal dynamics. To properly adhere to this methodology, legal sociologists must temporarily externalise their observation perspective; they must examine the law from a position that is independent from the discipline itself. On the other hand, legal sociologists do not content themselves with simply observing and describing the law from an external, sociological perspective; instead, they look to re-import what they have learned back into the law, in order to improve the law's workings.

The origins of the scientific study of law and society date back to the threshold of the 20th century when two lawyers, Eugen Ehrlich (in Europe) and Roscoe Pound (in the United States), together argued that a formalist conception of the law (where law is encapsulated in a closed and self-sufficient realm of jurisprudence) should be rejected. In order to oppose and overcome legal formalism, they invented sociological jurisprudence as a field of research that was, as Pound had famously stated in 1910, more concerned with law in action than law in books.[4] They claimed that any scientific study of legal practice in general is a sub-domain of sociology.[5] However, the problem with conceiving legal science as a sub-domain of sociology is that one overlooks the fundamental difference between "is" and "ought". Whereas the statement that something "is" the case is a description of observed facts, as sociological studies do, the statement that something "ought" to be the case, as the law does,

4 Roscoe Pound, Law in Books and Law in Action, in American Law Review, 44, 1910, pp. 12.

5 Eugen Ehrlich, Fundamental Principles of the Sociology of Law, translated by Walter L. Moll, New Brunswick 2002 (1913), p. 25; Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, in Harvard Law Review, 24(8), 1911, pp. 591, p. 594.

prescribes a normative end. Although it was some time ago that the pioneers were trying to resolve the paradox of engaging in a sociological analysis of the law, the distinction between description ("is") and prescription ("ought") continues to present a methodological challenge to legal sociology.

2. Method

While legal sociology is not a sub-discipline of sociology, it has, ever since its beginnings, been influenced by the writings of classic sociological theorists including Auguste Comte (1798–1857), Karl Marx (1818–1883), Emile Durkheim (1858–1917), Max Weber (1864–1920), Talcott Parsons (1902–1979), Niklas Luhmann (1927–1998) and Jürgen Habermas (born in 1929), to mention just a few. Adopting a sociological perspective enables the legal sociologist to take into account social facts which offer important information about the law's causes as well as its effects. Legal sociology is thus an empirical science of the law, analysing its emergence and functioning. The approach is decidedly objectivist; it aims at a value-free observation and description of factual developments, without letting normative preconceptions dictate the outcome. To better understand the operation and effect of the law, legal sociology builds on or develops *theories* offering perceptions of the social structure and the law's function within a society of ever-growing complexity.

What exactly is a theory? A theory is generally defined as an abstract scientific idea or model that is used to describe a certain aspect of reality. Besides simply describing this reality, a theory normally also attempts to provide explanatory (causal) statements. A *social* theory, more specifically, aims at explaining social phenomena. To meet the ambitions of science, verification or falsification through empiric observation is also required. The purpose of using theory in the social sciences is primarily complexity management: a theory provides for a simplified model of the reality segment that the researcher is attempting to observe, describe and test. Without such simplification, the observed segment would be overly complex and the observation would not be distinct from noise and therefore be unsuitable to draw meaningful conclusions from it.

Thus, a theory enables a social scientist to make certain assumptions about the world and to build analyses, comparisons and predictions from this assumption without being permanently required to take account of the world's full complexity in his work. Regarding the ways in which theories

materialise, it is roughly possible to distinguish between inductive and deductive approaches. *Inductive* theories come about through the observation of a certain aspect of reality, followed by a subsequent explanation that needs to be generalised and then empirically tested. *Deductive* theories, in contrast, build on hypotheses that are designed by a theorist through abstract thinking. The persuasiveness of a given hypothesis is then measured in relation to the results that its exposure to empiric verification or falsification produces.

As a rule, all types of social theories may find application in legal sociology. It should be noted, however, that if several theories are simultaneously used to analyse a specific reality, special attention must be paid to their compatibility with one another. This is one methodological challenge to legal sociology; an even bigger challenge, however, relates to the aforementioned distinction between "is" and "ought". The question is how to transfer the knowledge that is gained within the descriptive context of social science to the realm of legal practice, which is where normative conclusions are drawn and performative effects result. The impossibility to meld the law and the social sciences is a paradox. The way out of this paradox is to construct legal sociology as a two-step method of socio-legal analysis. The first step involves an empiric observation and description of real legal problems from the perspective of social science and social theory. While this is necessary to fully understand the social dimension of the legal problems at issue, a second step must follow where an attempt is made to re-import the gained insights back into the legal system. This second step requires a change of perspective from describing social facts to prescribing normative ends and is essential if legal sociology is to contribute to the law's improvement.

II. Law, Society and Direct Democracy

The political system in Switzerland is characterised by a specific form of direct democracy that exists within the framework of the Federal Constitution.[6] In the following section, I will first analyse the autonomy of the political system in Switzerland from a sociological perspective. In a second step, the societal preconditions of direct democracy in Switzerland will be identified. Third, I will elaborate on how the Constitution enlists mass media in general and public service broadcasting in particular to contribute to the effective functioning of democracy in Switzerland.

1. Political Autonomy

When I refer to political autonomy, something particular is in my mind: the understanding of politics as an autonomous sub-system of society in the sense of Niklas Luhmann's theory of autopoietic social systems. Autonomy of politics in this sense implies that the system is capable of self-reproduction according to its own rules, that is, political rules (not, for example, economic or religious rules). Luhmann conceptualises society itself as an *autopoietic system*; this term is used to describe something that is reproducing its elements out of its own elements.[7] The elements of a social system are communications, as opposed to humans, or actions of humans, or other agents.[8] Luhmann defines communication as the synthesis of three selections: the selection of "utterance", the selection of "information", and the selection of

6 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution www.admin.ch (https://perma.cc/M8UJ-S369).

7 Niklas Luhmann, Social Systems, translated by John Bednarz with Dirk Baecker, Stanford 1995 (1984).

8 Hugh Baxter, Niklas Luhmann's Theory of Autopoietic Legal Systems, in Annual Review of Law and Social Science, Vol. 9, 2013, pp. 167, p. 176; Hans-Georg Moeller, The Radical Luhmann, New York 2012, pp. 19.

"understanding".[9] In a communication process, the distinctions of utterance and information of the first communication are understood by the second one. While an utterance is an act of expression, information refers to the distinction between the act and its content. The existence of a system implies a distinction between the system and its environment. Every system constitutes itself according to one specific (binary) difference, and everything that is not part of the system is in the environment. For the political system, for example, the juxtaposition of the (binary) values of "power" and "not power" is constitutive. Systems are operatively closed, which implies that for their reproduction they simply monitor their own operations and exclude every other consideration. Within society, a number of sub-systems have differentiated: they differ from each other in the specific *function* that they fulfil within society. Politics is one of the social systems that Luhmann distinguishes in his writings. Other sub-systems of society that he covers in his scholarship include the economy, science, art, religion, education, mass media, and family.

The function of the political system is "*providing the capacity that is required for assuring collectively binding decisions*".[10] Although the political system is distinct from the legal system (whose function it is to generalise normative expectations), both legislation (the acts of making and enacting statutes) and constitutions provide for important mechanisms of structural coupling between the two systems. Statutes are simultaneously important for the law and for politics. In legislation, the law prescribes the form that statutes must have. Politics, on the other hand, requires the creation of statutes in order to be able to implement political power. The legal system is internally structured through the distinction between its centre and periphery.[11] While courts are at the centre of the legal system, legislation (and contracts) is located in its periphery. It is the periphery which is the contact zone between social systems. The periphery is thus the place where a democratic impulse coming from the political system may trigger changes within the legal system. As an example one may think of a newly adopted statute that compels the courts to adapt an established case law. A constitution is a second mechanism of

9 Niklas Luhmann, The Autopoiesis of Social Systems, in R. F. Geyer and Johannes van der Zouwen (eds.), Sociocybernetic Paradoxes: Observation, Control, and Evolution of Self-Steering Systems, London 1986, pp. 172, p. 175.

10 Niklas Luhmann, The Reality of the Mass Media, translated by Kathleen Cross, Stanford 2000 (1995; cit. Luhmann, The Reality of the Mass Media), p. 84.

11 Baxter, p. 176.

structural coupling between the law and politics.[12] The constitution of a nation state has a double existence as a supreme text of legal authority and as a political foundation of society. A nation state constitution thus provides "*political solutions for the problem of self-reference of the legal system and legal solutions for the problem of self-reference of the political system*".[13]

The democratic potential of a political system depends on the extent to which it is able to maintain its autopoiesis.[14] The state itself is defined by Luhmann as the self-description of the political system. It is possible to observe the state's operations and its autopoiesis both from the perspective of society and from the perspective of interactions between citizens. From the perspective of society, a state itself is autopoietic as long as it is able to shape its self-reproduction autonomously both internally (i.e. in relation to the subsystems of politics) and externally (i.e. in relation to the governmental and non-governmental entities in its environment). From the perspective of interactions, a state can enhance its autopoiesis by maximising the conditions for citizen participation in the political process.[15]

Historically, the differentiation of politics as an autonomous social system developed in stages. In the terminology used by Jürgen Habermas, these stages can be described as "the bourgeois state", followed by "the bourgeois constitutional state" and finally "the democratic constitutional state". Reconstructed within a framework of systems theory, these terms articulate self-descriptions of the political system at different junctures in the process of societal differentiation. In this sense, the first stage of the bourgeois state describes an absolutist rule establishing "*a sovereign state power with a monopoly on coercive force as the sole source of legal authority*".[16] The second stage of the bourgeois constitutional state describes a condition of advanced political differentiation which enables citizens to claim subjective public rights against the sovereign power before an independent authority.[17] The division

12 Niklas Luhmann, Law as a Social System, translated by Klaus Alex Ziegert, Oxford 2004 (1993; cit. Luhmann, Law as a Social System), pp. 405.

13 Luhmann, Law as a Social System, p. 410.

14 Sandra Braman, The Autopoietic State: Communication and Democratic Potential in the Net, in Journal of the American Society of Information Science, 1994, 45 (6), pp. 358, p. 365.

15 Braman, p. 365.

16 Jürgen Habermas, The Theory of Communicative Action: Lifeworld and System: a Critique of Functionalist Reason, translated by Thomas MacCarthy, Vol. 2, Cambridge 2007 (1981), p. 358.

17 Habermas, pp. 359.

between executive and judicial powers leads to the taming of the administrative apparatus as individuals can now go to court to have their liberties protected. Finally, the stage of the democratic constitutional state describes the condition of a fully differentiated political system with far-reaching inclusion of citizens in the reproduction of political communication. Within a democratically constituted order, citizens possess not only individual liberties which they can enforce against the state (negative freedom) but also the right to equally participate in the political discourse (positive freedom).[18] The separation of power now manifests itself as an institutional differentiation of legislative, executive and judicial state functions.

Political autonomy in the democratic constitutional state presupposes that decisions of governmental authorities are prepared, accompanied and checked as a part of the competition between opinions "in the marketplace of ideas". The marketplace metaphor, particularly popular in the United States, was coined by Oliver Wendell Holmes, a famous justice of the US Supreme Court (and mastermind of the American tradition of legal realism). In a 1919 dissenting opinion, Justice Holmes wrote "*that the ultimate good desired is better reached by free trade in ideas – that the best of truth is the power of the thought to get itself accepted in the competition of the market*".[19]

In many existing constitutional democracies, political participation is limited to the right to participate in the election of the parliament or the president. In Switzerland, however, instruments of direct democracy have been broadened over several constitutional reforms over the passage of time (a mandatory referendum on constitutional amendments has existed since 1848, a voluntary referendum on statutory amendments since 1874 and a popular initiative for the revision of the Constitution since 1891). Notably, the right to vote and to be elected was only extended to women at the federal level after the vote of the people of 7 February 1971, while at the cantonal level this has only been the case across the country since 1990.

2. Direct Democracy

The model of direct democracy existing in Switzerland depends on societal preconditions which it cannot guarantee itself, as well as on cultural

18 Habermas, pp. 360.

19 Abrams v United States 250 U.S. 616 (1919), Mr. Justice Holmes Dissenting, 630 (https://perma.cc/GK3V-ZT8L).

resources that need to be renewed permanently. Of these required societal preconditions, the following are the most important: acceptance of dissenting opinions and a spirit of compromise, tolerance towards others, a sense of civic public spirit, a living civil society and plural societal structures. John Stuart Mill, an influential thinker of liberalism, considered the confrontation of dissenting opinions as one of the key preconditions of social progress:

> *"It is hardly possible to overrate the value, in the present low state of human improvement, of placing human beings in contact with persons dissimilar to themselves, and with modes of thought and action unlike those with which they are familiar … Such communication has always been, and is peculiarly in the present age, one of the primary sources of progress."*[20]

Further, Immanuel Kant, the eminent philosopher of the enlightenment, coined the term "extended way of thinking" (erweiterte Denkungsart) to describe an individual's capability to also consider a problem from the perspective of an adversary. In Kant's words: "*Through always impartially looking at my judgements from the perspective of others I hope to get a third point which is better than my previous one.*"[21]

This capability to include the adversary's perspective in one's own considerations is a key precondition for rational discourse and any form of democratic politics. To ensure the regeneration of cultural resources, education is of primary importance. In Switzerland, the frequent elections as well as the numerous votes on a wide range of political issues require knowledge about the institutions of a democracy and presuppose a minimum understanding of the most important financial, economic, environmental, cultural and social policy implications. Citizens receive the education necessary for making competent decisions about such challenging issues from a minimum set of public offers at various levels of education. In this sense, Article 19 Constitution guarantees the right to an adequate and free primary school education as a fundamental right and Articles 61a to 68 Constitution provide for the concept of a high quality "Swiss Education Area" that is public, generally affordable and accessible, and extends to all levels of education. From

20 John Stuart Mill, Principles of Political Economy with some of their Applications to Social Philosophy, edited by W. J. Ashley, 7th edition, London 1909 (1848), 3rd book, 18th chapter.

21 Immanuel Kant as quoted in Jörg Paul Müller, Die demokratische Verfassung, 2nd edition, Zurich 2009, p. 91 (own translation).

an objective constitutional perspective, the Swiss system of extensive public education is supposed to provide for a type of civil and democratic education that will enable every citizen to form an independent opinion on the many issues that permanently need to be decided at the ballot box.

In this regard, Article 93 Constitution also recognises that radio and television have an important contribution to make to the functioning of democracy in Switzerland. Such a democracy-functional understanding of electronic mass media in Switzerland is in line with the case law of the European Court of Human Rights (ECtHR). Notwithstanding the significant rise of the Internet and social media in the recent past, the ECtHR still emphasises the continuing importance of television as a mass medium with an "immediate and powerful effect" on the decision-making of the public in a democratic society.[22] Accordingly, the duties of the Swiss radio and television system regarding "education", "cultural development", "free shaping of opinion" and "entertainment" listed in Article 93 II Constitution must be interpreted from a democracy-functional perspective. When implementing these four goals, radio and television have to pay attention to the "particularities of the country" and the "needs of the Cantons" thus contributing to cohesion in Switzerland. The principles of accurate presentation of facts and diversity of opinion are mentioned as means to reach these goals in Article 93 II Constitution. These principles are justiciable and can be enforced, as a rule, against any radio and television broadcaster established in Switzerland. They are supposed to contribute to securing a generally accessible and diverse offering of the high quality information that people need in order to comply with their democratic duties as citizens.

There are key challenges to the media's true fulfilment of its constitutional, democratic duties. Hannah Arendt is one of the voices having most clearly and eloquently warned of the political dead ends and cultural confusions of modernity. Under the after-effects of National Socialism in Germany in 1961, she asked:

> *"[I]f, the modern political lies are so big that they require a complete rearrangement of the whole factual texture – the making of another reality, as it were, into which they will fit without seam, crack, or fissure, exactly as the facts fitted into their own*

22 See Animal Defenders International v. The United Kingdom, App no 48876/08, ECtHR 22 April 2013, paragraph 119 and J. Bratza concurring, paragraph 6; Jersild v. Denmark, App no 15890/89, ECtHR 23 September 1994, paragraph 31; Murphy v. Ireland, App no 44179/98, ECtHR 3 December 2003, paragraphs 69, 74.

> *original context – what prevents these new stories, images, and non-facts from becoming an adequate substitute for reality and factuality?"*[23]

Her answer: it is, above all, philosophers, scientists and artists in their isolation, independent historians and judges as well as journalists adhering to facts, working according to an "existential mode of truth-telling".[24] Indeed, combating political lies with diligently researched and checked facts is one of the most important duties of journalism.[25]

For their decision-making, citizens in a direct democracy particularly depend on the mass media distinguishing between factual accounts and the opinions of the newspaper's or broadcaster's own collaborators and guest contributors. For Arendt, facts and opinions are no antagonists as long as it is assured that opinions are formed on the basis of facts. There is a relationship of dependency between the two: effective freedom of expression presupposes the availability of sufficient factual information as a basis for opinion making.[26] The problem for journalism is that facts are expensive to research and check; thus, the mass media may be tempted to respond to the current economic pressure by replacing hard facts with (cheap) opinions.[27] When facts are upstaged by unfounded opinions it is inevitable that the credibility of the mass media suffers – as the transatlantic fuss about "fake news" or "Lügenpresse" demonstrates.[28] Deflated citizens retreat into their echo chambers where any news is trustworthy as long as it is shared between like-minded people.

Although scandals have always played a role in the economy of the mass-media, the factual basis of news has ultimately always been the touchstone of professional journalism. Is this about to change under conditions of online blogs and social media? Selected by personalisation technologies employed by social media sites, outrageous or scandalous posts appear on top of a Facebook user's newsfeed because they are most likely to match the type

23 Hannah Arendt, Between Past and Future: Eight Exercises in Political Thought, New York 1993 (1961), p. 253.

24 Arendt, p. 259.

25 Timothy Garton Ash, Free Speech: Ten Principles for a Connected World, New Haven/London 2016, p. 202.

26 Arendt, p. 238.

27 Garton Ash, p. 195.

28 See, for example, The Economist, America's alt-right learns to speak Nazi: "Lügenpresse", 2016 (https://perma.cc/3SPQ-S9YX).

of information that had previously attracted her attention, based on previous activities and searches. During the 2016 US election campaign, obvious lies went viral including Donald Trump's claim that Barack Obama was the founder of Islamic State and Hillary Clinton the co-founder.[29] For Cass Sunstein, a Harvard law professor, there is no doubt that Trump's insulting tweets about his political adversaries "*put him at the centre of what was, for many, an engine for group polarization – and helped vault him to the presidency*".[30] Further, Sunstein fears that personalisation technologies distort the free market of ideas, instead leading to fragmentation of the political discourse.[31] An inclination towards "post-truth politics" and the turn to a "post-factual society" endanger the public sphere, which constitutes a structural principle of democratic politics. The "public sphere" is the social space where different opinions are expressed and various problems and solutions are discussed. It is a key premise of the public sphere that Kant's "extended way of thinking" can unfold and that political actors are always aware of their decisions' contingency. A democratic order presupposes that conflicts are solved by way of public discussion. However, if Sunstein's fear that personalisation technologies distort the free market of ideas and lead to fragmented political discourse should prove true, the normative requirements of the public sphere are questioned. To be sure, a parallelism of fragmented public spheres where issues are only discussed between like-minded people would not be able to establish the shared auditorium necessary for a democratic order. Competition between arguments in the political forum would no longer be possible and the political system's cognitive openness and learning ability would be challenged.

There have been two important sets of objections against Sunstein's theory in the academic literature. A first objection argues that newspapers and electronic mass media have always been biased, appealing to certain audiences only; thus, news personalisation is no novel concern. From media sociology we know that selectivity is generally one of the key functions of mass media.[32] Through the selection of specific information, the mass media reduce overwhelming social complexity and protect systems and individuals

29 See The Economist, The post-truth world: Yes, I'd lie to you, 2016 (https://perma.cc/3N3E-MUHA).

30 Cass R. Sunstein, #Republic: Divided Democracy in the Age of Social Media, Princeton 2017, p. 83.

31 Sunstein, 2017, p. 320.

32 See Luhmann, The Reality of the Mass Media, p. 34.

from overload. Within a newspaper company, for example, members of the editing staff are in charge of selecting the information that will be covered. The newspaper's journalistic policy and internal standards will often strongly influence the angle from which facts will be examined or the selection of op-eds that readers may encounter. However, the point here is that this selection process does not happen blindly and readers will generally know what type of journalism and editorial bias they can expect from a particular newspaper, TV channel or radio station. Readers in Switzerland, for example, know – not in detail but on the whole – where a newspaper such as Neue Zürcher Zeitung, Tages Anzeiger or Weltwoche stands. This is different in the digital environment because no Facebook subscriber or Google search user will have any idea of the grounds on which the respective algorithms have chosen the news they are recommending individual users to read or watch. The key difference between traditional news outlets and personalisation technologies online, therefore, is transparency of bias.

A second set of objections question the empirical foundation of Sunstein's thesis that there is not much deliberation beyond echo chambers and that group polarisation is an effect of online content personalisation technologies. In one of the first data-driven studies on personalised recommender systems, Hosanagar et al. argued in 2012 that "*the antecedent, that recommenders create fragmentation, is ultimately an assumption*".[33] This study, however, had a very limited scope and did not extend to the effects of personalisation technologies on news programming.

One year later, Yochai Benkler and his colleagues at the Harvard Berkman Klein Center authored an empirical analysis of the SOPA-PIPA debate that also challenged Sunstein's thesis to a certain extent.[34] This debate followed proposals by the US Congress to introduce the SOPA (Stop Online Piracy Act) and PIPA (Protect Intellectual Property Act) as new IP enforcement bills in 2011. The bills were stalled as a consequence of massive Internet protests including a 24-hour Wikipedia blackout on 18/19 January 2012, millions of e-mails and thousands of phone calls addressed to members of US Congress

33 Kartik Hosanagar et al., Will the Global Village Fracture into Tribes: Recommender Systems and their Effects on Consumers, in Management Science, 2014, 60 (4) (https://perma.cc/AXP9-QUZD), p. 807.

34 Yochai Benkler et al., Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate, Harvard University, Berkman Center for Internet & Society, Berkman Center Research Publication No. 2013–16, 2013, available at http://ssrn.com (https://perma.cc/89W6-AYQM).

to raise awareness of the harm that the planned laws would mean for Internet freedom. The authors from the Berkman Klein Center argued that their analytical study of this debate provided a perspective "on the dynamics of the networked public sphere that tends to support the more optimistic view of the potential of networked democratic participation".[35]

However, in defence of Sunstein and against the arguments of the Berkman Klein Center, one might argue that the SOPA-PIPA debate was very technology-centred and thus was particularly capable of mobilising masses of tech-interested people in the US. Therefore, it may not be representative of the general population's attitudes and values in this area. Indeed, a 2013 book by Ethan Zuckerman seemed to partially confirm Sunstein's thesis. According to Zuckerman it is a paradox of technological connection that a greater number of people around the globe sharing information and perspectives may lead to narrower representations of the world than in a less connected world.[36]

Research which both confirmed and questioned Sunstein's theory was the recent Berkman Klein Center study on online media and the 2016 presidential elections in the United States. The researchers worked with an impressive sample of more than 2 million stories collected from a broad range of sources on the open Internet, including mass media sites, government sites, private sites, blogs etc.[37] They found a pronounced asymmetry between the structure and composition of the media circulated on the right compared to the left. Whereas on the right highly partisan pro-Trump reporting and strong polarisation tendencies prevailed, the situation was different on the liberal (in the US understanding of the word) side. On the right the centre of gravity was clearly Breitbart, while on the left long-standing mass media (such as New York Times, Washington Post, CNN etc.) were also commonly in circulation, allowing such sources to play an important role as intermediaries and defenders of high quality journalistic standards and objective reporting. Hence, the public sphere continued to exist. From this important study one can thus deduce that Sunstein's thesis of group polarisation very much depends on

35 Benkler et al., pp. 9.

36 Ethan Zuckerman, Rewire: Digital Cosmopolitans in the Age of Connection, New York 2013.

37 Robert Faris et al., Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election, Berkman Klein Center Research Publication No. 2017–6, 2017, available at www.ssrn.com (https://perma.cc/93B3-ZV99), p. 21.

the state of quality mass media. Where high quality mass media are able to reach a wide audience, the danger of group polarisation is clearly minimised.

3. Public Service Broadcasting

As mentioned above, public service broadcasting (PSB) is determined by the Constitution as being one of the main institutions securing the renewal of those resources that are essential for the functioning of the Swiss model of direct democracy. The extent to which the Constitution requires broadcasting regulation for the purpose of safeguarding democracy may be striking to a foreign, particularly non-European, observer.[38] Before elaborating on the legal framework of public service broadcasting under Swiss law and discussing potential future developments under conditions of intelligent algorithms and personalisation technologies, some empiric data concerning media consumption in Switzerland is provided.

a) Media Consumption and the Internet

The most recent empiric research confirms both that media consumption in Switzerland primarily takes place on the Internet and that the mass media have already been eclipsed by social media. Today, the Internet is the most frequently used medium for information sourcing, especially in the age group of 15 to 34 year olds. Of the media offered on the Internet, the global search engines and social media (including Google, YouTube, Facebook, WhatsApp and Instagram) on average generate four times more attention than the online offers from the established Swiss mass media. Young people in particular very much focus their Internet media consumption on those global sources. According to the 2016 Media Quality Yearbook of the Research Institute for the Public Sphere and Society at the University of Zurich ("Forschungsbereich Öffentlichkeit und Gesellschaft, fög)",[39] online news sites, web portals and social media are the main sources of information for 62 % of 18 to 24 year olds, and for 22 % of all young adults they are the only source of information. For 43 % of young adults the smartphone is the main technical means to access information online.

38 For the discussion in the United States see C. Edwin Baker, Media, Markets, and Democracy, Cambridge 2002, p. 193.

39 See for more information www.foeg.uzh.ch.

Google (mainly via its ownership of YouTube), Facebook, WhatsApp, Instagram, etc. cooperate with the global media corporations and disseminate their content on their platforms. In collaboration with the Reuters Institute for the Study of Journalism at the University of Oxford, the Research Institute for the Public Sphere and Society conducted a representative survey involving more than 2000 Internet users in Switzerland. According to this survey, 36 % of the interviewed users already consume their news via Facebook. These findings explain why Swiss media companies are now cooperating with the social media giant. Commuter newspapers and tabloids rather than quality newspapers dominate the range of Swiss-origin media currently available on Facebook.

The Research Institute for the Public Sphere and Society survey also emphasised the formidable importance of social networks in the news economy. As advertising revenues increasingly migrate to the Internet in general and the large platform firms in particular, this source is rapidly vanishing as a means for funding the mass media. This development can only lead to increasing difficulties for the mass media in developing alternative business models for the news market. The gravity of the mass media's financial problems is epitomised across the globe by the large number of quality newspapers that disappear every year.

As research by Sunstein and others suggests, the extended use of personalisation technologies by platform firms is reinforcing the already existing trend towards filter bubbles[40] and fragmented public spheres, with the worrying prospect that communication – including about political issues – is increasingly taking place only between like-minded parties; a situation starkly at odds with Mill's pre-conditions for social progress, outlined above. These mostly theoretical assumptions about the effects of personalisation technology are, however, backed up by Research Institute for the Public Sphere and Society empiric findings that people who primarily consume their news via YouTube, Facebook etc. typically have less confidence in the media system. Conversely, those people who frequently use public service broadcasting for their news consumption have a higher degree of confidence in the media system. Confidence in the mass media in turn promotes a general interest in news, as well as improving consumers' willingness to pay for information. However, the data about the Swiss media market clearly shows that raising consumers' general awareness that high quality information is

40 Pariser, 2011.

expensive will not be able to resolve the grave financial problems of information journalism.

As a preventative measure against further migration of advertising to social media, Swiss media companies are increasingly investing money in technologies of "behavioural targeting", allowing the personalisation of advertising and news on the basis of collected user data. However, most of the media companies in Switzerland are too small to collect large amounts of data (Big Data). Further, they do not have the financial means or technical know-how that would be required for data analysis and aggregation (Data Mining) or to develop more sophisticated targeting technologies. Thus, as an alternative solution, they are seeking to join forces with partner companies; a strategy that has led to the creation of Admeira, the recently established joint venture between the Swiss Broadcasting Corporation (SRG), Swisscom and Ringier (a media company). The purpose of Admeira is to establish an alliance of the three companies in the field of online advertising. As a telecom company, Swisscom possesses detailed information about its customers, extending – in the case of mobile services – to their online behaviour. In the eyes of SRG, the fact that Swisscom has broad experience of using targeting technologies such as Real Time Advertising or Real Time Bidding establishes the company as a particularly attractive partner for collecting and analysing data. Swisscom, on the other hand, benefits from cooperation with SRG and Ringier because they produce costly news and entertainment programmes that Swisscom can make available on its own TV and entertainment platforms, as opposed to Swisscom having to produce them itself.

b) Personalisation Technologies

The establishment of Admeira raises the key question of whether the use of personalisation technologies by the SRG in order to target individual users would be reconcilable with the broadcaster's public service remit as defined by Swiss law. Machine Learning (ML), Data Mining, data analysis and other techniques of Artificial Intelligence (AI), have boosted the development of personalisation algorithms that allow companies to produce sophisticated user profiles, which can be employed to predict users' future behaviour.[41] The more data that is available for training the algorithms, the finer-grained predictions they are able to make. If a media company knows exactly what kind

41 Mireille Hildebrandt, Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology, Cheltenham/Northampton 2015, p. 109.

of person a customer is, it may be tempted to use the personalisation technology to take person-related decisions not only regarding advertising messages but also regarding the news and other types of content that a user will see on her screen.

This prospect creates a potential conflict between the SRG's commercial and technological preferences and the legal requirements arising from its public service remit. As mentioned, Article 93 II Constitution provides for a public service mandate, requiring the system of radio and television as a whole to contribute "*to education and cultural development, to the free shaping of opinion and to entertainment*", thus supporting the renewal of the cultural resources necessary for the functioning of democracy and for safeguarding cohesion between the different linguistic regions, cultures and mentalities in the country. Within a setting defined by the economic and cultural particularities of Switzerland, different options for implementing this public mandate are possible. Under the order of a parliamentary committee, the Swiss Government in 2014 published a report which reflected on structural change in the media sector in Switzerland and asked how this was impacting on the fulfilment of the constitutional public service mandate by radio and television in particular and the media sector in general. This reflection was paralleled by political pressure from right-leaning groups requiring an open debate about the institutional implementation of the public service mandate. In a partial response to these pressures, the Swiss government in 2016 produced a further report reviewing the definition of public service broadcasting and analysing the relationship between private electronic media and SRG in the fulfilment of the public service mandate. These reports and debates show a general awareness amongst those involved in policy-making of the potentially far-reaching consequences of the ongoing structural change in the media system. However, there is no consensus so far on how politics should respond to this issue. In a vote of 4 March 2018, a 71.6 % majority of the citizens and all Cantons said no to a popular initiative that wanted to abolish the compulsory levy which serves to finance the SRG and public broadcasting in Switzerland. Although considerable critique was raised against the SRG (including expansionist business practices and too much shallow entertainment) in the run-up to the vote, the result was almost unanimously interpreted as a clear political commitment to the SRG and to robust public service broadcasting.[42]

42 See the article ‚Attack on public broadcasting licence fee clearly fails' on Swissinfo, 4 March 2018 (https://perma.cc/L28R-YXQ3).

Accordingly, there is a strong likelihood that the currently existing institutional setting will continue to prevail for the next couple of years. This setting provides for the legal obligation of the SRG (as the public broadcaster) and a selected number of private broadcasting companies to contribute to the fulfilment of the public service mandate. The law places the main responsibility for the provision of the public service mandate clearly on the shoulders of the SRG. The small number of private broadcasters, which are authorised with a licence and partly financed through the broadcasting levy, provide their services mainly at local and regional levels.

Article 24 Radio and Television Act[43] provides that the SRG has a comprehensive public service remit. First, the SRG has to live up to high quality standards as regards the news and other content that it is producing. Further, in this regard, the SRG must ensure that its programmes are able to reach the entire Swiss population. Moreover, the public service broadcaster has to advance cohesion between different regions and cultures in Switzerland. For this purpose, the SRG is required to contribute to linguistic exchange between language regions and to financially equalise economic differences between regional media markets. As a consequence, less affluent Italian and French speaking regions are cross-subsidised by the wealthier German speaking area to ensure that a similar offer of quality programmes is available everywhere in Switzerland. This model secures that the same range of public service programmes is supplied in every linguistic region in Switzerland. As compensation for fulfilling its broad mandate, the SRG enjoys inter alia financial privileges as it receives a major part of the broadcasting levy which all households in Switzerland are required to pay. The Swiss broadcasting levy currently amounts to CHF 365 per household per year, which is expensive in international comparison. As a result of the debate about the SRG's future in the run-up to the vote of 4 March 2018, a reduction of the levy to CHF 300 seems to be a likely consequence.

If Swiss law justifies the privileged position of the SRG by pointing to the particular mandate that the broadcaster fulfils in favour of democracy and cohesion, then it is of primordial importance that the SRG's content actually reaches the entire population. Personalisation of content could potentially conflict with these stipulations, and especially considering the risks of

43 Federal Act on Radio and Television of 24 March 2006 (Radio and Television Act, RTVA), SR 784.40; see for an English version of the Radio and Television Act www.admin.ch (https://perma.cc/9KBY-G4KS).

fragmentation and polarisation, as described earlier, it is a rather contradictory course for the SRG to pursue. The SRG should ensure a counterbalance to the above-mentioned tendencies of social media and online platforms and should provide that high quality content reaches the entire population in Switzerland.

The fundamental challenge for the SRG will be to convince young people in particular that its programmes are sources of reliable information, which is essential for the future of democracy and cohesion in Switzerland. To achieve this, the SRG will need to explore the extent to which personalisation technologies could work for the good of the public service mandate. The key question is: how can user targeting be combined with "translation services" to both make young audiences aware of perspectives that are qualitatively distinct from those encountered on social networks and online platforms and to enable them to decipher quality in the media?

III. Summary

Legal sociology is an empiric sub-discipline of the law that is primarily interested in observing the emergence and functioning of the law from an objective perspective. It is only in a second step that a change of perspective occurs, from objective description to normative prescription. Accordingly, the legal sociologist is wearing two hats: the hat of a social scientist who is observing the law from an external sociological perspective and the hat of a jurist who is pondering the gained insights from a system-internal legal perspective and who eventually makes recommendations for improving the law's workings. The law, as an autopoietic sub-system of society, will understand the legal sociologist's recommendations based on its own system-rationality, and then autonomously decide what to do with them.

A legal sociology perspective can be useful in analysing how structural change impacts on the interaction between law and society and the functioning of direct democracy in Switzerland. News selection through personalisation technologies and other forms of artificial intelligence potentially interferes with the concept of direct democracy, which presupposes the existence of citizens who are competent to take informed decisions on a diverse range of matters of political interest. The Swiss model of direct democracy depends on societal preconditions, which it cannot guarantee itself and on cultural resources that need to be renewed continuously. The resources that direct democracy needs for its reproduction are citizens' capabilities to build their own independent opinions on the many political issues they are supposed to take decisions on at the ballot box. According to the Constitution, two institutions are primarily responsible for enabling citizens to meet the requirements of this task: a system of generally accessible public education and a system of public service broadcasting. Under current law, the SRG is in charge of the latter. The raison d'être of the SRG is the fulfilment of a public service mandate requiring it to guarantee high quality and diverse information and to contribute to cohesion between the different cultures in the country. The SRG can discharge this duty only if its programmes are able to reach the entire population. Personalisation of content – a potentially tempting business

strategy in the competition (with transnational platform corporations) for user attention – would probably contradict this aim. However, further research on content personalisation and how this technology could be utilised in order to bring high quality information to the attention of younger audiences could be useful.

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